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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA,

) CASE NO. CR 18-00172 BLF

Plaintiff,

) UNITED STATES' MOTION TO ADMIT
EVIDENCE PERTAINING TO AN
UNAVAILABLE WITNESS PURSUANT
FEDERAL RULE OF EVIDENCE 804

MICHAEL KAIL,

Defendant.

NOTICE OF MOTION

TO THE CLERK OF THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS

OF RECORD: PLEASE TAKE NOTICE that at 8:30 a.m. on Tuesday, April 13, 2021, before the Honorable Beth L. Freeman , the United States of America, by and through his undersigned counsel, will move the Court, pursuant to Federal Rule of Evidence 804, for admission of deposition evidence and associated exhibits relating to Benjamin Werther, an unavailable witness. This Motion is based upon this Notice of Motion, the points and authorities below, the pleadings and papers on file in this matter, and other materials or arguments as may be presented.

As noted above, this motion seeks admission of deposition testimony and associated exhibits

1 pertaining to an unavailable witness pursuant to Federal Rule of Evidence 804.

2 **MOTION**

3 The United States moves to introduce the former testimony of unavailable witness Benjamin
 4 Werther at trial pursuant to Federal Rule of Evidence 804. In support of the motion, the United States
 5 asserts that the hearsay exception articulated in Rule 804(b)(1) has been satisfied for the reasons
 6 described below.

7 Benjamin Werther, the Founder and former Chief Executive Officer of Platfora, Inc. (“Platfora”),
 8 provided sworn, transcribed, and videotaped deposition testimony over two days, on April 29 and 30,
 9 2015. Defendant, Michael Kail, was the named defendant in the civil suit by the plaintiff, Netflix, Inc.
 10 (“Netflix”), which made similar allegations as the government does in this criminal case: that Defendant
 11 defrauded Netflix by purchasing software and services from companies that were paying him in cash or
 12 stock options. Defendant’s (and Unix Mercenary, LLC’s) attorney (Scott Goldman, an attorney at the
 13 same firm that represented Mr. Kail during the criminal investigation) attended both days of the
 14 deposition and made objections and asked questions of Mr. Werther, who was shown and testified about
 15 several documents on the government’s exhibit list (notably, 309, 313, 314, 333, 344, 348, and 350). Mr.
 16 Werther testified that the documents were records of Platfora’s regularly conducted business activities.
 17 Mr. Werther’s testimony related directly to Defendant’s role in approving a contract between Netflix
 18 and Platfora and Defendant’s solicitation of a stock-compensated advisory board position with Platfora.

19 **I. Unavailability**

20 Werther, an Australian citizen, has for several months been in Australia, which has strict
 21 isolation and quarantine restrictions for anyone returning from abroad, and does not plan to return to the
 22 United States until Summer 2021. On December 22, 2020, in response to an inquiry by the government,
 23 Mr. Werther’s attorney stated that she would inquire whether Mr. Werther would accept service of the
 24 trial subpoena. She responded the next day that Mr. Werther had relocated to Australia through July or
 25 August 2021. On March 25, she again confirmed that Mr. Werther was unwilling to travel to the United
 26 States for trial, even at the government’s expense, in part due to his inability to return to Australia,
 27 where his family lives, as a result of several weeks of quarantine if he were to leave Australia, due to
 28 pandemic safety restrictions. The government reached out to counsel for the witness more than two

1 months before the original trial date to secure his attendance at trial. The cases cited by Defendant, in
 2 which the Court declined to find the witness unavailable, are inapposite. Mr. Werther is not in federal or
 3 state custody in the United States already. He is beyond the reach of a United States trial subpoena. He
 4 cannot be brought before the Court by the Marshals.

5 II. Former Testimony

6 The government raised with Defendant its intention to introduce this sworn deposition testimony
 7 at Defendant's trial pursuant to Federal Rule of Evidence 804(b)(1), which provides:

8 The following are not excluded by the rule against hearsay if the declarant
 9 is unavailable as a witness:

10 (1) Former Testimony. Testimony that:

11 (A) was given as a witness at a trial, hearing, or lawful
 12 deposition, whether given during the current proceeding or a
 13 different one; and

14 (B) is now offered against a party who had—or, in a civil
 15 case, whose predecessor in interest had—an opportunity and
 similar motive to develop it by direct, cross-, or redirect
 examination.

16 The government asserts that, given that Defendant is outside of the United States and beyond the
 17 jurisdiction of the Court, he is unavailable as a witness for purposes of Rule 804(b)(1). *See United States*
 18 *v. McFall*, 558 F.3d 951, 963 (9th Cir. 2008) (district court's decision to admit or exclude evidence
 19 under Rule 804(b)(1) is reviewed for abuse of discretion). If Defendant is found to be unavailable, there
 20 is no basis for excluding this testimony as hearsay. Moreover, Defendant's status in the civil suit was
 21 highly similar to his status in this case: a represented party to a suit in which the plaintiff alleged he
 22 directed business to Platfora in exchange for an undisclosed compensated advisory position and his
 23 decision to compensate Platfora at the termination of its proof-of-concept phase above and beyond the
 24 terms of the contract between the companies as a result of his conflict of interest. *See United States v.*
 25 *Salerno*, 505 U.S. 317, 326 (1992) (Blackmun, J., concurring and noting that "similar motive" for
 26 purposes of this exception does not mean "identical motive" but rather is an "inherently . . . factual
 27 inquiry" based on "the similarity of the underlying issues and on the context of the . . . questioning");
 28 *See also McFall*, 558 F.3d at 963 (holding that the motive to cross-examine at a prior hearing need not

1 be “as intense as it would have been at trial”); *but see United States v. Wilson*, 36 F. Supp.2d 1177, 1184
 2 (N.D. Cal. Feb. 10, 1999) (denying admission in criminal trial of prior non-video deposition testimony).

3 Mr. Werther’s testimony is extremely relevant to the issues to be decided by trial. Similar to his
 4 role in this criminal trial, Mr. Werther provided both testimony as an individual and also served as a
 5 representative of his company, Platfora. Moreover, the testimony is videotaped, and the jury can see and
 6 evaluate Mr. Werther’s words, speech, and other aspects that reflect upon his credibility similarly to
 7 their ability to do so in trial. The testimony was also much closer in time to the events in question: only
 8 one year after the termination of the Netflix-Platfora agreement and Mr. Kail’s resignation as a member
 9 of Platfora’s Customer Advisory Board.

10 Defendant’s only real basis for his objection (*see* ECF No. 175) to the testimony is its
 11 inculpatory nature. Mr. Werther understood that Defendant was in charge of the budget for IT solutions
 12 at Netflix, including Platfora. As the 60-day unpaid demonstration began in July 2013, Defendant was
 13 offered an advisory board position compensated with options. Mr. Werther and Defendant discussed
 14 difficulties implementing Platfora at Netflix, and Werther was concerned that Netflix would not enter a
 15 contract until Platfora’s “3.0” product was released months later. Defendant met Mr. Werther in person
 16 for dinner and raised the potential for a \$600,000, 3-year contract with Netflix, and also discussed his
 17 interest in an advisory role at Platfora.

18 [T]here was a specific part of the conversation where he talked about what
 19 he likes to do as an adviser and that -- and that when he is an adviser, his
 20 standard rate is a quarter -- a quarter of a percentage point of equity. And
 21 that that was something that I should consider.

22 Transcript, Apr. 29, 2015, 151:11-16 (Exhibit 1, p. 34). Defendant pointed to his relationship with
 23 SumoLogic as an example for Platfora to follow. Mr. Werther memorialized his conversation with
 24 Defendant the next morning, stating, “the strong suggestion was that if we did [make Defendant a
 25 compensated advisor], and remain responsive like we have been, we’d be able to a \$600k 3 year deal
 26 done by Labor Day.” *Id.*, 163:13-25 (Exhibit 1, p. 42). In August 2013, Defendant became an advisor
 27 entitled with options to purchase 75,000 shares of Platfora. Although Platfora vetted its two prior
 28 advisors for conflicts of interest, it did not do so for Mr. Kail. Platfora asked for a three-year, \$250,000
 per year contract for its product, to which Defendant signed on behalf of Netflix. In a December 2013

1 email from Werther to a sales manager at Platfora, he referred to Defendant's advisory role as a "pay to
 2 play" situation. Id. At 233:23-25 (Exhibit 1, p. 66). Between September 2013 and April 2014, Platfora
 3 was not utilized in any significant manner at Netflix outside of limited product testing. Mr. Kail did not
 4 attend Platfora's Advisory Board meetings. When one of Defendant's direct reports unilaterally
 5 cancelled the contract at seven months, as the month-to-month portion of the contract was to convert to
 6 an annual subscription, Defendant resigned from his advisory role and approved payment of the
 7 remaining \$155,000, representing the remainder of a successful first-year of the contract, over the
 8 objection of a Netflix purchasing manager.

9 This testimony is clearly relevant to the fraud charges in this case. Moreover, Mr. Werther's
 10 substantive testimony about his company's acceptance of Mr. Kail's "strong suggestion" to offer him
 11 equity to get a sale to Netflix formalized falls within the "statement against interest" exception under
 12 Rule 804(b)(3), as they were "so contrary to the declarant's proprietary or pecuniary interest." Mr.
 13 Werther's testimony also authenticates numerous relevant Platfora documents as business records,
 14 including business-related emails with Defendant and other Platfora employees and Board members.
 15 Pursuant to Federal Rule of Evidence 104(a), the Court is not bound by the Rules of Evidence in
 16 determining whether the proffered evidence is admissible. This evidence is further "relevant to the
 17 weight and credibility of other evidence" in this case, namely, the exhibits related to Platfora, Inc. and
 18 the testimony of former Platfora, Inc. employees Michael Asher, Theresa Vu, and Michael Rossi. See
 19 Fed. R. Evid. 104(e).

20 Defendant argues to minimize the "prior testimony" hearsay exception contained in Rule 804,
 21 effectively arguing (without support) that a prior civil deposition, by its very nature, could never satisfy
 22 Rule 804(b)(1). But that is not the standard. Defendant had the "opportunity and similar motive to
 23 develop" the evidence from Mr. Werther. That Defendant was not physically present, or that he would
 24 later be accused of criminal conduct by the federal government, or his attorney's decisions regarding
 25 objections and questions, is not a basis for finding that the testimony does not satisfy the hearsay
 26 exception.

27 Given that the government has made reasonable but unsuccessful efforts to obtain Mr. Werther's
 28 presence at trial; Mr. Werther's 2015 deposition was sworn and videotaped only a year after some of the

1 events in question; numerous deposition exhibits are now trial exhibits; and Mr. Kail was represented at
2 the deposition and was defending against similar allegations, this Court is fully capable of ruling on
3 objections without risking a waste of time or confusion of the issues, and the jury may give the
4 testimony the weight it deserves. Accordingly, the government submits that the evidence it seeks to
5 admit, i.e. deposition testimony and accompanying exhibits pertaining to Benjamin Werther, is proper
6 pursuant to Federal Rule of Evidence 804.

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9 DATED: April 12, 2021

Respectfully submitted,

10 STEPHANIE M. HINDS
11 Acting United States Attorney

12 _____/s/
13 COLIN C. SAMPSON
14 DANIEL KALEBA
15 CHRIS KALTSAS
16 Assistant United States Attorneys